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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,

Respondent.

ON WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

I.

ULTRA VIRES.

The repurchase agreement was clearly ultra vires and in direct violation of the National Bank Act.

Respondent, a National Bank, had only the powers conferred upon it by the "National Bank Act" (5136 of the Revised Statutes). The powers conferred upon National Banks by Section 7 of this Act, so far as applicable here, are as follows:

> "*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all

such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title; *Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities.*"

The portion in italics was first added by the Act of Congress of February 25, 1927, amending said section.

This amendment to the National Bank Act made in 1927 placed an express prohibition upon transactions such as are here involved. It specifically limits the purchase and sale of investment securities to "*buying and selling without recourse marketable obligations.*"

While the term "without recourse" may have a well settled meaning when applied to the endorser of a negotiable instrument as is indicated by the authority cited by petitioner, it is also true, as is indicated by that same authority, that when otherwise employed these words "have no *exact* legal significance." *Thompson* v. *First State Bank*, 102 Ga. 696.

In *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, at page 699, it is said:

> "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

It clearly appears that these words, "without recourse," as used in the National Bank Act, are not to be restricted or limited to the obligation of an indorser. This is made plain by an examination of the Act itself. The restriction applies to the sale of "*marketable obligations* • • • in the form of bonds, notes and/or debentures commonly known as *investment securities.*"

The sale of securities of this character seldom if ever require the endorsement of the seller. They are almost invariably payable to bearer and title passes by delivery. The requirement of the Statute must therefore be that the sale be *without recourse* in the ordinary meaning of the term, and would prevent the incurring of any contractual obligation by a national bank in connection with the sale by it of such securities.

A further examination of this amendment to the National Bank Act shows even more clearly the intended meaning of the term "without recourse." The restriction in question applies not only to *selling* of marketable investment securities but to the *buying* of such securities as well. The language of the statute is "that the business of buying and selling investment securities shall hereafter be limited to *buying* and selling *without recourse.*"

Of course there can be no contention that any obligation of an endorser is involved when the term "without recourse" is applied to a purchaser. The only way that a purchaser could give recourse to a seller would be by some contractual arrangement such as to resell at a specified price or to share profits realized. If the terms "without recourse" be interpreted as preventing a purchaser from entering into a resale contract, they should also be interpreted as preventing a seller from entering into a repurchase contract.

The repurchase agreement here involved was given with the very apparent intention of affording to the purchaser of the bonds, recourse against the seller in the event that they were not paid by the maker at maturity. The language used is:

> "Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000 and accrued interest."

The time for repurchase specified is "*at maturity.*" The contingency provided is the "*desire*" of the purchaser. Of course the only occurrence at *maturity* that could create a *desire* to sell the bonds would be the failure of the maker to pay. The contract permits the purchaser of the bonds to hold the same until maturity in spite of any decrease in their market value and, after collecting interest thereon during the full period, to collect their par value and accrued interest from the bank, while the bank is powerless to in any way protect itself from any loss.

In *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554, the court with reference to a similar repurchase agreement at page 566 said:

> "Speculation by a banking corporation with the funds deposited with it and its entry into the guaranty or surety business are neither within the principles of sound banking business nor the powers conferred by the statute under which it is organized, yet to insure the price of bonds, as was attempted by this agreement, is nothing short of a guaranty and possesses an inherent evil not found even in speculation, in that the bank cannot hope to re-purchase such bonds while they command a market price higher than that fixed in such agreement, hence no chance of gain exists. The guaranty of such bonds is not a transaction ordinarily and commonly considered to be within the scope of general banking business as that term is commonly used and understood, and cannot be said to come within the

power conferred by the statute quoted, to do a general banking business. Nor is such power a necessary incident to the powers granted."

Greene v. *First National Bank*, 172 Minn. 310, involved a repurchase agreement given by a national bank under circumstances similar to those involved in the case at bar. The federal statute, there considered, permitting national banks, doing business in a place having a population not in excess of five thousand inhabitants, to act as a broker with reference to loans on real estate located within one hundred miles of the place where the bank was located. This statute provided, however, "that no such bank shall in *any case* guarantee either the principal or interest of any such loans." The court in this connection said:

> "In the case at bar the defendant did not act as a broker or agent. It made the loans for itself and they became part of its assets. In selling the mortgages defendant dealt with its own property. Nevertheless we think that defendant was prohibited by the act from guaranteeing payment of the principal or interest of the loans. The words italicized indicate that it was the policy of Congress to prohibit national banks from guaranteeing notes secured by real estate mortgages in any case whatever. If we are right in this conclusion, the bank had no authority to enter into contracts for the repurchase of such notes and mortgages, *for the objections to such contracts are even greater than to those of one of guaranty.*"

It is further contended by petitioner that the repurchase agreement constitutes the entire transaction a conditional sale and consequently a sale without recourse. This seems to be a contradiction of terms. If the sale was a conditional sale, the very essence and object thereof would have been to afford recourse to the purchaser. It certainly would not have brought the transaction within the limitation of the statute requiring that the "business of buying and selling

* * * be hereafter *limited* to buying and selling without recourse." But the decision of this question in *Knass* v. *Madison and Kedzie Bank,* 354 Ill. 554, should be conclusive that the repurchase agreement here was not a conditional sale. Here as in the "Knass" case the bank, by the terms of the written agreement, agreed to repurchase the bonds sold at a specified price. Here also the agreement recites the payment of the purchase price in full by the purchaser, who is under no obligation to return the bonds or the interest received but may dispose of them as he sees fit. Here again title passed to the purchaser without any condition remaining to be discharged. Under these circumstances the Court in the *Knass* case held that the transaction was not a conditional sale.

The court there, at page 570, said:

> "Counsel for complainants also argue that this agreement was not a repurchase contract but a conditional sales contract; that the bonds were taken on condition that they might be returned, and that such a contract is enforceable. They cite *Wolf* v. *National Bank of Illinois,* 178 Ill. 85, and *Stewart* v. *Dobson,* 282 *id.* 192. In the former case the contention was that contracts similar in terms to those before us were options and gambling contracts. The court held, however, that the record showed that it was the intention of the parties that the purchaser was to be allowed a certain time in which to elect whether he was to keep or return them, and so the transaction was a conditional sale. Such are not the facts here, but it is evident that complainants and the bank considered that the sale was completed and by a separate agreement the bank agreed to repurchase the bonds. Such does not constitute a conditional sale. It was also there held that the transaction was not a gambling contract prohibited by section 130 of the Criminal Code. The statute for the protection of bank depositors was not called to the attention of the court. *Stewart* v. *Dodson, supra,* involved a contract for repurchase between indi-

viduals and no question of limitation of powers arose. The question there was whether the agreement was a gambling contract, prohibited by section 130 of the Criminal Code. These cases are not controlling here. It seems clear here that both the evidence of the transaction itself and the theory on which the bill is brought preclude a construction of these agreements as conditional sales contracts."

Of the Illinois cases cited by petitioner at the top of page 12 of his brief, the first and last cases are the only ones involving questions of corporate power and have both been overruled by the *Knass* case, 354 Ill. 554. An application for the review of the *Knass* case by the United States Supreme Court was refused. 291 U. S. 660.

It is suggested by attorney for petitioner that there is a distinction between the *Knass* case and the case at bar in that the bank in the *Knass* case acted only as a broker and received as its profit from the transaction, the commission agreed upon for the sale of the securities. We do not understand these to be the facts. The Supreme Court of Illinois did point out in its opinion that the bonds were the obligations of the corporations that owned the real estate and signed the bonds and in that sense were NOT THE BONDS OF THE BANK. There is also reference made to the fact that the bank MAY have received a commission for them although there is nothing in the record to show that fact. However, the method pursued by banks in underwriting real estate loans is a matter of common knowledge, and the fact that the bank's service or profit for loaning its own money and selling the bonds is commonly referred to as a commission does not render any the less true the fact that the bonds were the property of the bank. Nor does it make any difference in the principle involved whether the bank underwrote a bond issue or purchased the bonds

on the open market. The loss to the bank would be the same if it was forced to repurchase when the market value was as a result of economic conditions greatly below the stipulated repurchase price.

Attorneys for appellee seek further to avoid the force of the decision in the "*Knass*" case by attempting to uphold the same on grounds more agreeable to their contentions than those adopted by the court. They claim the repurchase agreement in that case was *ultra vires* because the bank was not authorized by the statute to buy real estate mortgage bonds under any circumstances. However, it is provided by the statute which they quote, that the bank "shall have the power to loan money on personal and real estate security." The purchase of real estate mortgage bonds should certainly be considered loaning money on real estate security.

It was the apparent intention of Congress in making the said amendment to the National Bank Act to prevent by an all inclusive provision the possibility of national banks incurring a contingent liability with reference to investment securities which they purchased or sold. The wisdom of this legislation cannot be doubted in the light of the recent rapid change in the value of securities, which has demonstrated that such contingent liabilities if extensively incurred would be disastrous to any bank. Against this contingent liability the bank is powerless to take necessary steps for its protection. The maturing of these agreements at or about the same time by a large number of purchasers may bring about the complete destruction of the banking institution and prevent the performance of its functions as an agency of the federal government. It may also cause a great loss to depositors and stockholders who rightfully rely upon government inspections and regulations for their protection.

In the face of this enactment by Congress, little weight should be given to the argument that the said provision does not mean what it so clearly states in simple and easily understood language, or that notwithstanding such provisions the right to incur this contingent liability is necessarily incident to the right to sell, and that while specifically prohibited, it is impliedly permitted by the National Bank Act.

In *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554, the court discussed the act of the Illinois legislature enacted for the same purpose as was the 1927 Amendment to the National Bank Act, and with reference thereto the court at page 567 said:

> "Are such contracts as here relied upon void as against public policy or violative of statutory enactment? Contracts against public policy are generally unenforceable by any remedy. (Re-statement of the Law of Contracts, Am. Law Inst., sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. Agreements such as are here involved fall within that category. Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void though there be found no specific statutory prohibition against them. It is an academic rule of law that from the constitution and statutory enactments may be gleaned the public policy of the State. The General Assembly of this State in 1879 passed an act entitled, 'An act for the protection of bank depositors,' approved June 4, 1879. (Smith's

Stat. 1931, Chap. 38, Par. 64.) Section 4 of this act is as follows: 'It shall not be lawful for any savings bank, individual or individuals doing banking business, banking company, or incorporated bank receiving savings deposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or interest on, any bonds, notes or other evidence of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or guarantee, whereby such deposits or trust funds could be jeopardized or impaired shall be null and void.' This section has not heretofore been construed by this court. It seems clear, however, that payment or assumption of or guaranteeing to pay bonds of the character here involved is of the gist of the prohibition of this act applicable in any case where by any such contracted liability the deposits or the trust funds of the bank could become jeopardized or impaired. The act for the protection of bank depositors evidences an intention on the part of the legislature to declare contracts of the character before us void as against the public policy of the State. That act, section 4 of which is herein quoted, was enacted, as the title indicates, for the protection of bank depositors. Its enactment was for the public generally and should be construed to carry out that purpose. *People* v. *Tallmadge,* 328 Ill. 210."

It is suggested by attorney for petitioner that the creation of such contingent liabilities is not necessarily dangerous, as the bank might protect itself by establishing *"a reserve against the maturity of such liability."* The fact alone that transactions of this character would make necessary such a reserve is a sufficient inducement for the action taken by Congress. The necessity of placing the proceeds of all bonds so sold in a reserve fund awaiting the maturity of the bonds would hardly commend itself as good or safe banking. It would require that large sums of the

bank's capital remain tied up and unused for long periods of time, and make their eventual availability as assets of the bank dependent upon the value of investment securities at the date of their maturity.

It will be observed that the grant of powers to national banks by the said National Bank Act before its amendment was substantially the same as the grant of powers by Banking Act of Illinois approved June 23, 1919, which was the subject of construction by the Supreme Court of Illinois in *Knass* v. *Madison and Kedzie Bank,* 354 Ill. 554.

It was there held by the Court that the term "general banking business" includes only such powers as are ordinarily conferred upon and used by banks such as loaning money, discounting notes, receiving deposits and dealing in commercial paper; and further that a repurchase agreement similar to the one involved in this case is not within the scope of a general banking business and is not within any of the powers conferred by the said State Banking Act, but is against public policy as it jeopardizes and impairs deposits and results in injury to depositors and the public.

The position taken by the Court in the *Knass* case has been reaffirmed in the recent case of *Hoffman* v. *Sears Community Bank,* 356 Ill. 598, where the Court stated that it adhered to the legal conclusions reached therein.

It follows that even without the amendment of 1927 the National Bank Act did not confer upon the national bank the power to enter into the repurchase agreement.

This interpretation was given to the National Bank Act by the Supreme Court of Minnesota in the case of *Greene* v. *First National Bank,* 172 Minn. 310, which was decided prior to the said amendment. In that case the Court said:

"But a guaranty of commercial paper sold by a bank

and a contract to repurchase real estate mortgages which the bank has sold stand on a different footing. As was said in *Eberlein* v. *Stockyards Mortg. & T. Co., supra,* to agree to repurchase on demand, and at face value securities the bank sells subjects it to a contingent liability, the sudden maturing of which, by the concurring demands of a large number of purchasers, may easily absorb its capital instantaneously. Paraphrasing the language of *Farmers' & M. Sav. Bank* v. *Crookston State Bank, supra,* it may be said that every bank is charged with duties to the public. A bank is more than a mere private corporation for pecuniary profit. A national bank is under the supervision of the federal authorities. A contract to repurchase real estate mortgages which the bank has sold is in defiance of safe banking, tends to injure the depositors of the bank, and is contrary to public policy.

The power to contract for the repurchase of a loan secured by a real estate mortgage is not expressly conferred by the National Banking Act. Neither is it incidental to those expressly conferred. *California Nat. Bank* v. *Kennedy,* 167 U. S. 362, 371, 42 L. ed. 198, 202, 17 Sup. Ct. Rep. 831, is a case dealing with the acquisition by a national bank of stock in another corporation. It was held that such banks do not possess the power to deal in stocks, and that an implied prohibition against such dealings resulted from the failure of Congress to grant the power. That doctrine is applicable here. National banks are not expressly authorized to make such contracts as defendant is alleged to have made. The failure to grant the power negatives its existence, for the power is of such a nature that it is not to be inferred in the absence of language clearly indicating its existence."

In *Weckler* v. *First National Bank,* 42 Md. 585, which was a case where the plaintiff, Weckler, brought suit against the First National Bank to recover the sum of one thousand dollars paid to the bank for bonds of the Northern Pacific R. R. Company, alleging that the sale was procured by false, fraudulent and deceitful representations made

by the bank's teller, the trial court instructed the jury that as the defendant was organized under the National Banking Act, the purchase and sale of bonds was not within its chartered powers and the plaintiff could not recover. The court of appeals after reviewing the powers of National Banks under the National Banking Act says, on page 595:

> "We are, therefore, clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. 8 G. & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the Court's instruction to the jury nor in the rejection of the appellant's first and second prayers."

To the same effect are the following:

Hotchkin v. Third National Bank of Syracuse, 219 Mass. 234.

First National Bank of Allentown v. *Hoch*, 89 Pa. State 324.

The amendment to the National Bank Act made in 1927 placed an express prohibition upon transactions such as are here involved. It specifically limits the purchase and sale of investment securities to "*buying and selling without recourse marketable obligations.*"

II.

ESTOPPEL.

A contract of a corporation which is ultra vires in the sense that it is beyond the powers conferred upon it by the legislature is not voidable only, but wholly void and of no legal effect and the corporation is not estopped from urging this defense.

Texas & Pacific Railway Company v. *S. O. Pottorff*, 291 U. S. 245.

Central Transportation Co. v. *Pullman Car Co.*, 139 U. S. 24-59.

California National Bank v. *Kennedy*, 167 U. S. 362.

First National Bank v. *Converse*, 200 U. S. 425-439.

Merchants National Bank v. *Wehrman*, 202 U. S. 295.

De La Vergne Refrigerating M. Co. v. *German Savings Institution*, 175 U. S. 40-58.

First National Bank v. *Hawkins*, 174 U. S. 364-369.

National Home Building and Loan Assn. v. *The Home Savings Bank, et al.*, 181 Ill. 35-43.

Durkee v. *The People*, 155 Ill. 354.

Farson v. *Fogg*, 205 Ill. 326.

Steele v. *Fraternity Tribunes*, 215 Ill. 190.

Stacey v. *Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546.

Converse v. *Emerson T. & Co.*, 242 Ill. 619.

Fritz v. *Equitable B. & L. Co.*, 186 Ill. 183, 198.

Best Brewing Co. v. *Klassen*, 185 Ill. 37.

Knass v. *Madison & Kedzie State Bank*, 354 Ill. 554.

Counsel for petitioner seek to avoid the principle established in the foregoing cases, to the effect that a corporation is not estopped from urging the defense of *ultra vires* to the attempted enforcement of a contract that is beyond the powers conferred, by contending that the making of the repurchase agreement here involved was merely the abuse of a granted power. There are undoubtedly certain so-called *ultra vires* acts which are within the *general authority* of a corporation and which people dealing in good faith with the corporation have a right to assume have been properly performed by the proper officers of the corporation. Where these acts are improperly or irregularly performed and the corporation benefits therefrom, it may be estopped from urging such irregularity as a defense. But the *ultra vires* act here involved is one which is not within the *general authority* of the corporation but is outside that authority and specifically prohibited by law.

There is not even a grant of the *general* power of purchase and sale of investment securities given to national banks by the National Bank Act. The Act specifically provides that the business of buying and selling such securities "shall be *limited* to buying and selling without recourse." But there would not be implied from a grant of general power to buy, even if it were given, the authority to make a repurchase agreement such as we have here.

We have shown that the power to guarantee the payment of bonds is not a necessary incident to their sale and will not be recognized as a banking power in the absence of a specific grant.

In the "Knass" case repurchase agreements like the one here involved are construed as being guaranties and against public policy, and in the case of *Greene* v. *First National Bank*, 172 Minn. 310, such contracts are considered as being

more objectionable than guaranties and not within the scope of general banking business.

If counsel's argument in this respect were followed, almost any violation by a bank of its statutory powers could be upheld as being merely the abuse of a granted power. Take as an illustration, the pledging by a bank of its assets to secure a private deposit. It would be contended that, as the bank had granted power to accept deposits and had granted power to make contracts, the contract giving its own property as security for private deposits was at most an abuse of those powers.

This, however, was not the view taken by this Court in its recent decision in the case of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, where it was held that this power of pledging assets to secure a private deposit was not conferred by the National Bank Act but was *ultra vires* and unenforceable, and in considering the principle of estoppel as applied thereto the Court, at page 260, said:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires contract*, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised."

A frequently quoted statement of this rule which has been consistently followed by this Court and by the Supreme Court of Illinois is from *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24, pages 59, 60 and 61, and is as follows:

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:
>
> A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of

its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

III.

IMPLIED ASSUMPSIT.

A.

Petitioner was limited by his affidavit of claim to a recovery upon the repurchase agreement alone and the question of recovery on an implied promise was not an issue in the case.

It is claimed by petitioner that even though the repurchase agreement is void, he is nevertheless entitled to recover the purchase price paid for the bonds and this apparently without a return of the bonds and at a time long distant from the time of purchase and after investment securities of all kinds have greatly declined in value.

Petitioner has cited in this connection a number of cases involving questions of unjust enrichment; cases where a corporation obtained money or property on its own void obligation alone. In such cases the courts have indicated that a recovery may be had upon the implied promise to pay for benefits received. These cases are different from the pending case where the bonds were not the obligations of the defendant bank but of another corporation, which were purchased by the bank and sold to the plaintiff. There is no allegation that they were sold at a profit. However, a detailed consideration of the cases cited is unnecessary as plaintiff in the case at bar based his right of recovery solely upon the repurchase agreement and its enforcement as a valid agreement. (See Appellate Court Opinion, Rec., 50.)

Plaintiff, with its declaration, filed an affidavit of claim (Rec., 4) in which he stated that his claim was for money—

> *"due and owing from the defendant to the plaintiff under its written agreement dated November 1st, 1929."*

Defendant by its plea and affidavit of merits set up its defense that the alleged contract was *ultra vires* and void.

Section 55 of the 1907 Practice Act of Illinois provides:

> "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion

specifying the amount (according to the best of his judgment and belief), * * *."

The foregoing provisions have been conclusively determined by the Illinois courts as limiting the issues made by the pleadings to only those that are supported by the respective affidavits of the parties. It was the purpose of the Act to make possible the limitation of the issues to matters that could be supported by evidence and to sift out allegations on each side such as are referred to by counsel as of the "catchall" variety. In this way it was anticipated that there might be secured a speedier termination of suits.

In *Firestone Tire Company* v. *Ginsburg*, 285 Ill. 132, the Court, by Mr. Justice Cartwright, at page 136, says:

> "Another ground alleged for affirming the judgment is that the pleas answered only the special counts of the declaration on the notes, and there being no plea on file to the common counts the judgment can be sustained upon that ground. The notes were admissible in evidence under the common counts, but the affidavit of claim made by the plaintiff showed that the action was on the notes and stated the amount due thereon, and the bill of exceptions shows that the notes were the basis of the judgment. There was no affidavit of any claim based on the common counts although the notes would be admissible under them, and the plaintiff's action was without any affidavit of claim except upon the promissory notes. The plaintiff was required to state in its affidavit the nature of its demand, and having stated it, all that was required of the defendant was to meet that statement by his affidavit."

So in the case of *Grant Keime* v. *Frank Thum, et al.*, 238 Ill. App. 519, it was held that there could be no recovery under the common counts on an implied contract where the affidavit of claim set up an express contract, and in that case the Court at page 522 says:

"The consolidated common counts were filed, stating

in nine different, general and indefinite forms the demand of the plaintiff. But the affidavit of plaintiff's claim eliminated all counts except that for 'goods, chattels and effects before that time sold and delivered by plaintiff to defendants at their request.' That count was by affidavit rendered certain and definite in all the terms authorizing a recovery. By it the quantity of corn sold and delivered, the price per bushel, and the express agreement of defendants to pay the price, were explicitly stated, and the amount due under those terms. Under the elementary principles of procedure he could recover only upon proof of those terms by a preponderance of the evidence if challenged, as they were, by an appropriate plea supported by an affidavit of merits of the defense stated in the plea. *Reddig* v. *Looney*, 208 Ill. App. 413. Upon this state of the record the parties went to the jury."

Other cases holding that recovery and proof are limited to the affidavit of claim are as follows:

In *Goddard Tool Co.* v. *Crown Electrical Mfg. Co.*, 219 Ill. App. 34, in the opinion by Mr. Justice Heard, it is said:

"We have set forth the affidavits of claim and of merits in so much detail for the reason that by section 55 of chapter 110, Rev. Stats. of Illinois (I. & A. 8592), the respective parties are limited in their evidence to the matters controverted by the affidavits. *Reddig* v. *Looney*, 208 Ill. App. 413; *Miller* v. *Thomas*, 200 Ill. App. 125."

George W. Reddig, et al., v. *John Looney*, 208 Ill. App. 413 (on pp. 419, 420):

"The rule above stated will not result in trying cases on issues formed by an affidavit of claim and an affidavit of merits. Though actions at law in the Circuit Court are to be tried upon the pleadings, yet under this statute the parties are limited also by their affidavit. Plaintiff can prove and recover only what is stated in his affidavit of claim, but he cannot prove and recover even that unless he has an appropriate declaration on that cause of action. Defendant can only prove such

> defense as is stated in his affidavit of merits, but he cannot prove that or have a verdict upon that unless he has a pleading appropriate to that defense. The proof and the verdict must be under proper pleadings, but no proof can be admitted or availed of under the pleadings unless it is supported by a proper affidavit."

This case (*Reddig* v. *Looney*) is cited with approval in an opinion of the Appellate Court of the First District in which all the authorities are reviewed. In this case, *Theron P. Cooper* v. *John A. Anderson*, 246 Ill. App. 1, the Court, on page 11, referring to said Section 55, says:

> "It is true that the affidavits do not take the place of the pleading, but the evidence to be offered and the issues to be tried are limited to the issues as made by the pleas as verified by the affidavits."

B.

By taking judgment on his affidavit of claim based solely upon the repurchase agreement petitioner abandoned any possible claim or recovery independently of that agreement.

When this case was remanded by the Appellate Court to the trial court after the reversal of the judgment in favor of respondent, it was redocketed in the trial court and the petitioner moved the court to strike respondent's affidavit of merits for insufficiency and for a *judgment on the affidavit of claim*, and thereupon the final judgment order of April 15, 1932, was entered. This judgment order recited that the matter came on to be heard on motion of plaintiff's attorneys to strike the affidavit of merits for insufficiency upon the remandment and reversal by the Appellate Court in accordance with the opinion rendered by it and for a judgment as of default on the *affidavit of claim*. It ordered the affidavit of merits stricken and found that,

from the *affidavit of claim*, there was due plaintiff $37,085.41, together with interest, for which judgment was given. (Rec., 7 and 8.)

This affidavit of claim on which the judgment was entered stated that plaintiff's demand was for $37,085.91 due and owing from the defendant to the plaintiff "*under its written agreement* dated Nov. 1, 1929." (Rec., 4.)

It thus appears that the petitioner by his own action and on his own initiative elected to base his recovery solely on the repurchase agreement and abandoned any claim of recovery independently thereof. Of course, as we have already shown, petitioner had already limited himself to such a recovery by his affidavit of claim. But counsel on page 21 of their brief contend that this affidavit was filed to the special count alone and that no affidavit was filed to the common counts, thereby implying, we assume, that there could still be a recovery under the common counts independently of the repurchase agreement. We do not agree with this contention but, assuming that it were correct, *by the election of petitioner there was no such recovery.* The record clearly shows that this action was brought and prosecuted for the sole purpose of recovering under the provisions of the *ultra vires* repurchase agreement.

C.

As this action was brought for the sole purpose of recovering under the terms of an ultra vires contract this court should not give consideration to the question as to whether petitioner might have maintained an action independently of the contract.

It is clear that there could not be a recovery both upon the express repurchase agreement and upon an implied

agreement for money had and received. The affidavit of claim, the motion of petitioner's attorney for judgment, and the judgment of the court all show that no question was raised or considered in the trial court as to the right of petitioner to maintain an action independently of the contract. Under like circumstances courts of review have refused consideration of this question.

In *Mercantile Trust Co.* v. *Kastor,* 273 Ill. 332, a similar situation existed and the Court after discussing the rule governing recovery on an implied contract for benefits received said at page 344:

> "This suit is brought against the defendant in error, however, upon his guaranty of the unlawful contract and not upon the implied contract. The trial court erred in instructing the jury. It should have given the instruction to find the verdict for defendant."

In *Hoffman* v. *Sears Community Bank,* 356 Ill. 598, the cause of action was based solely upon a repurchase agreement and a recovery by plaintiff below was reversed, and judgment given by the Supreme Court for defendant for costs.

In the *"Knass"* case, 354 Ill. 554, the Court refused the specific performance of a similar repurchase agreement and as the bill was based solely upon the void contract, it was ordered that the judgments of the lower courts be reversed and the cause remanded with directions to dismiss complainant's bill for want of equity.

In *Central Transportation Company* v. *Pullman's Palace Car Company,* 139 U. S. 24, the Court at page 61, says:

> "Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit,* or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, ac-

cording to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for."

In *De La Vergne Refrigerating M. Company* v. *German Savings Institution*, 175 U. S. 40, the Court after holding that the contract involved was *ultra vires*, said on page 59:

> "As the action in this case *is upon the contract* and as the contract is prohibited by the charter of the refrigerating company there can be no recovery on it."

However, a recovery in general assumpsit could not be sustained, even if the question was before the court on the record. Any such claim would arise out of a transaction which was prohibited by law and against public policy. Under these circumstances a court will not give assistance to either party but will leave them where it finds them.

We have already called the court's attention to the position taken by the Supreme Court of Illinois in the "Knass" case, where it states that such contracts are void as against public policy and as violative of statutory enactment, that

> "Contracts against public policy are generally *unenforcible by any remedy*. (Restatement of the law of contracts, Am. Law Ins., Sec. 369.)"

Courts generally have taken this position that they cannot assist a plaintiff to get payment for efforts to accomplish what the law declared should not be done and that no recovery can be had therefor either on the express contract, or on an implied contract or on *quantum meruit*.

De Kam v. *City of Streator*, 316 Ill. 123.

Charles W. Flack, et al. v. *John S. Warner, et al.*, 278 Ill. 368.

Norbeck & Nicholson Company v. *State of South Dakota*, 32 S. D. 189.

Gibbs v. *Baltimore Gas Co.*, 130 U. S. 396.
M. Hunter v. *Pearl L. Wheate*, 289 Fed. 604.
Ernest J. Seitz v. *Theodore Michel* (Minn. Supreme Ct.), 181 N. W. 102.

CONCLUSION.

We therefore respectfully submit that the written agreement of November 1, 1929 was in conflict with and prohibited by the provisions of Section 5136 of the Revised Statutes of the United States as Amended in 1897; that there can be no enforcement of such an agreement as it is *ultra vires*, illegal and against public policy; that the plaintiff's action was on this contract and he was limited by his affidavit of claim to a recovery thereon; that the question as to whether the plaintiff could maintain any action against the defendant independently of this contract was not presented to or considered by the trial court and cannot be raised here.

We therefore respectfully ask that the judgment of the Appellate Court of Illinois, First District, be affirmed.

Respectfully submitted,

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